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In the Supreme Court of the United States

OCTOBER TERM, 1992

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SUPREME COURT, U.S.

RONA M. FIELDS,
PETITIONER,

v.

CLARK UNIVERSITY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT CLARK UNIVERSITY IN OPPOSITION

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The respondent, Clark University, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 966 F.2d 49 (1st Cir. 1992).

STATEMENT OF THE CASE

Petitioner was employed as a full-time associate professor in the Department of Sociology at Clark University ("Clark") from 1972 through 1976. In this capacity, petitioner taught

courses in female studies, research methods and social psychology.

Petitioner was considered for tenure at Clark in the 1974-75 academic year. In accordance with the procedures then in effect, the six members of the Sociology Department met and considered whether to recommend petitioner for tenure on the basis of the four criteria specified in the University's faculty handbook: scholarship, teaching, service to the College and length of service. The Department obtained written evaluations of petitioner's scholarly work from outside "referees" who were not affiliated with the University, and likewise obtained written evaluations of petitioner's teaching performance by contacting students identified by petitioner and by conducting a random sampling of students who had enrolled in her courses.

In October 1974, the six members of the Sociology Department unanimously recommended to the University's Committee on Personnel ("COP") against tenure for petitioner. The members explained that their recommendation was based on the unusual intensity of the negative comments they had received from students regarding petitioner's teaching performance, many of which comments had noted a sense of haste, disorganization, and lack of preparation on petitioner's part regarding course content, assignments, course procedures and grading. The members also stated that petitioner's written work lacked depth and focus, and was marked by the same type of disorganization that characterized her teaching performance.

After being apprised of the Sociology Department's unanimous recommendation against tenure, petitioner exercised her right to request the Department to review its decision. Pursuant to that review, petitioner asked the Department to obtain written references from three Clark faculty members and one of her former students. Two of the three faculty references named by petitioner, as well as petitioner's lone student reference, declined to endorse petitioner's candidacy for

tenure. In addition, during the Department's review, Assistant Dean of Students Sheila McCann advised the Sociology Department that she could not support petitioner's candidacy in light of the numerous student complaints that had been registered about petitioner's teaching performance. After further deliberations on petitioner's case, the Sociology Department faculty met on November 15, 1974 and voted unanimously to uphold its original decision not to recommend tenure.

Following the Department's recommendation, petitioner's tenure file was submitted to the University's COP. The COP is composed of nine elected members of the faculty, and is responsible for evaluating the qualifications of all tenure candidates and making final recommendations to the President of the University.

Prior to the COP's evaluation of petitioner's qualifications, Dean of the College Frank Puffer reviewed petitioner's tenure file. Following his review, Dean Puffer concluded that the Sociology Department had complied with proper University procedures in evaluating petitioner's qualifications. However, since petitioner had complained about the methods used by the Sociology Department to obtain student evaluations, Dean Puffer recommended that the COP conduct a further survey of University students to ensure that petitioner's teaching performance had been fairly evaluated.

The COP approved Dean Puffer's recommendation, and, accordingly, additional student evaluations of petitioner's teaching record were obtained in February 1975. The overall content of the additional student evaluations submitted to the COP was substantially similar to the content of the evaluations previously obtained by the Sociology Department. For instance, in the evaluations submitted to the COP, students criticized petitioner for her highly disorganized courses, incomprehensible lectures, unavailability to and hostility toward students, and arbitrary work assignments.

In reviewing petitioner's qualifications for tenure, the COP requested the University's academic deans to submit their recommendations regarding petitioner's candidacy. Both Dean of the College Frank Puffer and Dean of the Graduate School Vernon Ahmadjian expressed the judgment that petitioner lacked the necessary qualifications for tenure. Dean Puffer advised the COP that, based upon the negative student evaluations submitted to the Sociology Department and the COP, he had concluded that petitioner's level of teaching performance was significantly below the minimum standards required by Clark.

On March 25, 1975, the COP voted unanimously (9 to 0) not to recommend tenure for petitioner. The COP's negative decision was based upon petitioner's unsatisfactory teaching record. Consistent with the COP practice of requiring two successive votes in all personnel actions, the COP met again on March 28, 1975 and unanimously reaffirmed its negative tenure recommendation. In early April 1975, petitioner requested the COP to reconsider its negative tenure recommendation. After further deliberations and meetings on petitioner's tenure case, the COP voted unanimously on two successive occasions not to reconsider its negative tenure recommendation.

In May 1975, the University's Board of Trustees affirmed the COP's negative tenure recommendation. Shortly thereafter, in June 1975, petitioner requested that a Faculty Review Committee ("FRC") be constituted to examine the University's negative tenure decision. In accordance with petitioner's request, a four member FRC was constituted to examine petitioner's charges that (a) her qualifications had been inadequately and unfairly reviewed, (b) she had been discriminated against on account of her sex, and (c) her failure to receive tenure constituted a violation of her "academic freedom."

After completing its investigation of petitioner's allegations, the FRC issued a report of its findings in June 1976. The FRC unanimously concluded that the procedures followed by the

University during petitioner's tenure review were sufficient to allow adequate consideration of her case in accordance with University standards. The FRC also unanimously agreed that petitioner's allegations regarding sex bias were without merit, and that petitioner had failed to establish that the teaching and research standards invoked in her case had been applied with less stringency in other tenure cases. Finally, the FRC unanimously concluded that petitioner had not submitted any *prima facie* evidence regarding the charge that her academic freedom had been violated.

Thereafter, in May 1980, petitioner filed a complaint against Clark in the United States District Court for the District of Massachusetts, alleging that the denial of tenure to her had been based on her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq*. Following extensive discovery, a trial was held without a jury in September 1985. On March 14, 1986, the Court (Skinner, J.) found that there was no evidence of improper bias in the procedures of the COP or the University's Board of Trustees, and also found that petitioner had "not proved that on this record, she is entitled to tenure." Pet. A. 105. However, the Court concluded that there was evidence of sexual bias in Clark's Sociology Department, and based upon this finding, declared that petitioner was entitled to relief under Title VII. Accordingly, the University was directed to reinstate petitioner for a two-year probationary period, and to reconsider her for tenure at the end of such period. Pet. A. 106.

On appeal, the Court of Appeals for the First Circuit vacated the District Court judgment and remanded the case for a new trial. *See Fields* v. *Clark University*, 817 F.2d 931 (1st Cir. 1987). The First Circuit ruled that the trial court had incorrectly applied the burdens of proof in adjudicating plaintiff's Title VII claim. In articulating the applicable standard, the First Circuit held that even if a plaintiff offers direct evidence that discrimination was a motivating factor in an employment decision, the plaintiff is not entitled to any relief

under Title VII if the employer can "prove by a preponderance of the evidence that the same decision would have been made absent the discrimination." Pet. A. 88. Accordingly, the First Circuit held:

> "The [district] court also erred by reinstating Fields for two years and awarding back pay without finding that the university, after having been afforded the opportunity to prove Fields would not have been granted tenure absent discrimination, failed to carry its burden of proof. We, therefore, remand the case for a new trial on all issues by another district court judge."

Pet. A. 90-91.

On remand, the case was assigned to the Honorable Robert E. Keeton. After holding a four-day trial, the Court on April 16, 1991 issued its Findings of Fact and Conclusions of Law. Upon an analysis of the evidence and applicable legal principles, the Court concluded that petitioner had failed to establish that she was qualified for tenure at Clark and hence had failed to establish a *prima facie* case of sex discrimination under the principles announced by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). More specifically, the Court stated:

> "Having weighed the evidence presented by plaintiff in this case, I find that she has not shown by a preponderance of the evidence that she was sufficiently qualified to place her in the middle group of tenure candidates in the sociology department at Clark University. . . . [p]laintiff was denied tenure by unanimous vote at each stage in the tenure review process, and failed to receive support from other men and women on the Clark faculty. Plaintiff's own testimony established that she had difficulties teaching some of the large courses to which she was assigned, and much of plaintiff's testimony was in the form of argument as opposed to recita-

> tion of fact. Defendant has introduced student evaluations and testimony from plaintiff and the defense witnesses showing that her teaching was criticized by several of her students and that the chair of her department told her on numerous occasions that he was receiving complaints from her students."

Pet. A. 47-48.

The Court further held that, regardless of whether or not petitioner had established a *prima facie* case, the University was entitled to prevail because it had articulated a legitimate, nondiscriminatory reason for its tenure decision — petitioner's poor teaching ability — and petitioner had failed to prove that this reason was a pretext for sex discrimination. Pet. A. 49.

In addition, the Court held that this case did not warrant analysis as a "mixed motive" case, because the evidence was insufficient to support a finding that petitioner's gender was a motivating factor in the University's decision. In reaching this result, the Court held that petitioner's testimony that one of her colleagues engaged in sexually biased conduct more than 18 months *prior* to the tenure decision did not compel the application of the *Price Waterhouse*[1] analysis in light of the *de minimis* role of petitioner's colleague in the ultimate tenure decision:

> "Even if I were to credit this statement as direct evidence of an improper motivation on the part of Gerber in a tenure vote made two years later, I could not find that improper motives on the part of one member of a six member department would constitute direct evidence of an improper motive on the part of the sociology department as a whole in its unanimous vote to deny tenure. Moreover, the recommendation of the sociology department was only the first stage of a tenure review process

[1] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

that included unanimous concurrence by the COP, the President, the Board of Trustees and the FRC."

Pet. A. 42-43.

Finally, the Court held that even if petitioner had established a mixed motive case, the University was still entitled to prevail because it had introduced sufficient evidence to satisfy its burden of persuasion under a mixed motive legal analysis. Pet. A. 44-45. In accordance with this opinion, the Court entered judgment for the defendant on April 16, 1991. Petitioner subsequently moved to alter or amend the Court's findings, rulings and order, or, in the alternative, for a new trial. The Court denied plaintiff's motion in a Memorandum and Order dated May 20, 1991.

On appeal, the First Circuit affirmed, stating that petitioner had failed to show that she was qualified for tenure at Clark, and hence had failed to establish a *prima facie* case that her sex had played *any* role in the University's denial of tenure to her. The First Circuit further stated that a "thorough review of the record provides no opportunity for this Court to find that the District Court's decision [with respect to petitioner's lack of tenure qualifications] was clearly erroneous." Pet. A. 21.

REASONS FOR DENYING THE WRIT

The decision of the First Circuit affirming the judgment of the District Court is consistent with the decisions of this Court and of other courts of appeal. The petition does not present any issue warranting review by this Court, particularly in light of the idiosyncratic and fact-intensive nature of tenure decisions and the unimpeachable findings of fact made by the District Court.

1. The first question suggested by the petition — whether a Title VII plaintiff who sufficiently proves that gender was a motivating factor in an adverse university tenure decision

within the meaning of *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) must also prove a *prima facie* case of discrimination as set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) — is not presented in this case. The District Court specifically found that petitioner had *not* sufficiently proven that her gender was a motivating factor in the University's denial of tenure to her, and the First Circuit affirmed this finding as not clearly erroneous.

Contrary to petitioner's assertions, she did not present any direct evidence of discrimination in this case. Rather, the most petitioner did was to introduce evidence that, nearly two years prior to the decision in her tenure case, one of her colleagues in the Sociology Department, Stan Gerber, said to her "that's not the way to behave if you want tenure around here" the day after she had rebuffed a pass he made at her. As the District Court specifically found, even if this constituted direct evidence that Gerber subsequently voted to recommend against tenure for petitioner because of her sex, it had nothing whatsoever to do with any of the other members of the Sociology Department who likewise voted to recommend against tenure for petitioner, nor with the numerous other faculty members and administrators who concurred in that recommendation. Pet. A. 42-43. In fact, petitioner's qualifications for tenure were independently evaluated by more than 20 faculty members and administrators at Clark, and the recommendation against tenure was unanimous at each level of the review process. Thus, petitioner did not present any direct evidence that she was denied tenure because of her sex.

In the absence of any such direct evidence, the First Circuit properly reviewed whether petitioner had presented any inferential evidence of gender discrimination and, in connection with that review, properly relied on the *prima facie* case analysis suggested by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). This was plainly consistent with this Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse* did not hold

that a Title VII plaintiff is relieved of any burden to produce probative evidence of unlawful consideration of gender, only that once she has done so, the burden shifts to the employer to show that it would have reached the same decision regardless of such consideration. Since, in the present case, petitioner did not present any such evidence—direct or inferential—that was credited by the District Court, her claim of sex discrimination was properly dismissed. The First Circuit correctly so held.

2. There was no error in the District Court's holding that petitioner had failed to present sufficient evidence—direct or otherwise—of gender consideration to shift the burden to Clark to show that it would have denied tenure to petitioner even without such consideration. As the District Court noted, petitioner's purported proof of gender consideration pertained to only one of the six members of the Sociology Department who considered her case,[2] and had nothing whatsoever to do with any of the other Clark committees and administrators who subsequently considered her case. Under these circumstances, petitioner's evidence was clearly insufficient to prove that her gender had anything to do with the University's ultimate decision to deny tenure to her. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor J., concurring) ("stray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers or statements by decisionmakers unrelated to

[2] Petitioner asserts at page 37 of her petition that a second member of the Sociology Department, Dr. Edward Sampson, condoned Dr. Gerber's "not the way to behave if you want tenure" comment when he subsequently stated to petitioner, in response to her complaint about the comment, "which of us would you prefer?" This testimony of petitioner, made for the first time at the second trial some 15 years after the alleged event, bears all the marks of a recent contrivance. Moreover, even if made, Dr. Sampson's alleged comment, as the District Court noted, fell far short of constituting direct evidence of gender discrimination by the several University entities that decided petitioner's case.

the decisional process itself, suffice to satisfy the plaintiff's burden in this regard."); *Jackson* v. *Harvard University*, 900 F.2d 464, 467 (1st Cir.), *cert. denied*, 111 S. Ct. 137 (1990) (declining to apply *Price Waterhouse* "mixed motive" analysis where an allegedly biased member of a tenure review subcommittee played a *de minimis* role in the ultimate decision to deny tenure.).

Indeed, the weighing of the evidence at trial to determine whether gender bias skewed the decision-making process is precisely the type of question of fact that is properly left to the discretion of the District Court. *See Jackson*, 900 F.2d at 467. The District Court, after an extensive examination of the documentary and testimonial evidence at trial, resolved that issue against the petitioner. There is no basis for holding that this finding was clearly erroneous.[3]

Furthermore, the District Court ruled that even if it were to assume the sufficiency of petitioner's evidence of gender discrimination, Clark had satisfied its burden under *Price Waterhouse* of proving that petitioner would not have been granted tenure in any event. Thus, the District Court stated:

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[3] Petitioner's reliance upon *Barbano* v. *Madison County*, 922 F.2d 139 (2d Cir. 1990) is of no assistance. The Court in *Barbano* merely held that on the record before it, the district court's finding of gender discrimination in the decision-making process was not clearly erroneous. Significantly, however, the Court in *Barbano* recognized that "discrimination by one individual does not necessarily imply that a collective decision-making body of which the individual is a member also discriminated." 922 F.2d at 142. Moreover, in contrast to this case — where the allegedly biased conduct occurred 18 months *before* petitioner's tenure review — the plaintiff in *Barbano* established that overt discriminatory conduct occurred during the actual job interview *and* that there was knowing and informed toleration of the discriminatory conduct by all members of the interview committee. In addition, one of the participants in the interview was chairman of the board which was responsible for making the final employment decision. In contrast, there is *no* evidence in this case that any sexually biased statements or conduct occurred during the Sociology Department's tenure deliberations in the Fall of 1974, and, moreover, no member of the Department participated in or influenced any of the subsequent tenure deliberations by other University committees.

> "Also, plaintiff's claim fails for the additional reason that defendant's evidence is strong enough to prevail even if plaintiff had succeeded in the first step under either analysis. That is, even if I were to determine that plaintiff had introduced sufficient evidence to show a prima facie case under *McDonnell Douglas*, or under *Hopkins* to make this a mixed motive case, rather than a pretext case, I would not ultimately decide for the plaintiff because defendant has introduced sufficient evidence of a legitimate, non-discriminatory reason for its decision to deny plaintiff tenure to satisfy its burden of persuasion even under the *Hopkins* analysis."

Pet. A. 44-45.

Petitioner has not, and cannot, suggest any basis for setting aside this additional finding as clearly erroneous within the meaning of Rule 52 of the Federal Rules of Civil Procedure. To the contrary, as summarized by both the District Court and the First Circuit, the evidence—in the form of written reports from disinterested students—was overwhelming that petitioner's performance as a teacher was inadequate for an award of tenure at Clark. Accordingly, even assuming that the *Price Waterhouse* analysis was applicable in this case, there would still be no basis for setting aside the District Court's dismissal of petitioner's claim.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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